



**Omari v Gumba; Ngoma & 2 others (Interested Parties) (Environment & Land
Case 76 of 2015) [2024] KEELC 6224 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6224 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 76 OF 2015
E ASATI, J
SEPTEMBER 26, 2024**

BETWEEN

ASMAN CHUMBA OMARI PLAINTIFF

AND

JOHN OUMA GUMBA DEFENDANT

AND

JANE ACHIENG NGOMA INTERESTED PARTY

ANNE ADHIAMBO OLANG INTERESTED PARTY

VITALIS ONYANGO ANJAO INTERESTED PARTY

RULING

1. This ruling is in respect of the Notice of motion application dated 27th May 2024 brought by the Applicant pursuant to the provisions of articles 50 (1) and 159 (2) (d) of *the Constitution* of Kenya 2010, sections 1A and B and 63(e) of the Civil Procedure Rules 2010. The application seeks for an order of stay of execution of the decree herein pending hearing and determination of the appeal to the Court of Appeal and that costs abide the outcome of the appeal.
2. The application is based on the grounds contained in the Supporting Affidavit sworn by the 2nd Interested Party Ann Adhiambo Olang and the annexures thereto.
3. The application was opposed by the plaintiff vide the grounds contained in the Statement of grounds of Opposition dated 7th June 2024.
4. The application was argued orally on 24th June 2024. It was submitted on behalf of the applicant that the applicant has appealed against the judgement herein. That in the meantime, the Respondent has vide the letter dated 13/5/2024 asked the appellant to move out of the suit land. That the applicant has



been residing on the suit land since 1990s. That she has put up a permanent house and a permanent wall. That the Respondent has pulled down the permanent wall thus exposing the applicant that the Respondent is threatening to use force to evict the applicant. That the appeal will be rendered nugatory if the orders sought are not granted.

5. On behalf of the Respondents it was submitted that there is nothing to stay as the suit land is already registered in the name of the Respondent. That the applicant has not proved the threshold for grant of the orders of stay of execution. That there is no draft Memorandum of Appeal to help the court determine the weight of the appeal. That where there is no appeal filed, the court has no jurisdiction to entertain an application for stay of execution. That the onus of proving substantial loss rests with the applicant and the court will not rely on mere assertions. That any loss suffered by the applicant if the appeal succeeds can be compensated by way of damages. That the court cannot aid the applicant to benefit from her own illegality and that from an illegal action a cause of action cannot arise.
6. The grounds for grant of orders of stay of execution of judgement, decree or order are provided for in Order 42 Rule 6(2) of the Civil Procedure Rules 2010 it provides as follows:

“No order for stay of execution may be made under sub rule (1) unless-

- a. The court is satisfied that substantial loss may result to the Applicant unless the order is made and that the Application has been made without unreasonable delay and
 - b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”
8. In the present case the applicant has demonstrated that she has filed an appeal to the Court of Appeal by exhibiting a Notice of Appeal dated 3rd May 2024 and lodged with the Deputy Registrar of the court on 13th May 2024. Under Order 42 Rule 8 an appeal is presumed to have been filed once the Notice of appeal is filed.
 9. The applicant has also demonstrated that she will suffer substantial loss if stay is not granted as her house may be demolished and the applicant be evicted.

I find that the application has merit and allow it as follows:

- a. There be stay of execution of the judgement herein dated 25th April 2024 pending hearing and determination of the appeal to the Court of Appeal.
- b. The Applicant to deposit the sum of Kshs.200,000/= as security for due performance of such order as may ultimately be binding on the applicant, in an interest earning account in the joint names of Counsel for the Applicant and Counsel for the Respondent within 45 days hereof, failing which the stay of execution order hereby granted shall lapse.
- c. Each party to bear own costs of the application.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU AND READ VIRTUALLY THIS 26TH DAY OF SEPTEMBER 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:



Maureen -Court Assistant.

Nyanga for the applicant

Kojo for the Respondent.

